In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-662

TIMES-PICAYUNE PUBLISHING CORPORATION, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

Petitioner contends that the court of appeals erred in holding that the district court had abused its discretion in dismissing the complaint of the Equal Employment Opportunity Commission for failure to allege satisfaction of particular procedural prerequisites to its right to sue.

In May 1973, the Commission filed this action against petitioner in the United States District Court for the Eastern District of Louisiana seeking relief based on asserted discriminatory employment practices in violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. (Supp. ~~I, II,~~ 1973 ed.) 2000e, *et seq.* In its complaint the Commission invoked two jurisdictional statutes[1] and alleged that the action was

[1] 28 U.S.C. 1343 and 1345.

expressly authorized by Section 706(f) of the Act.[2] The original complaint alleged that petitioner was engaged in an industry affecting commerce, that it employed more than 25 persons,[3] and that all conditions precedent to the instituion of the lawsuit had been fulfilled (Pet. App. 9a). The Commission then amended its complaint to allege, in lieu of the general allegation concerning conditions precedent, that a charge had been filed and that conciliation efforts had been unsuccessful, thereby tracking the requirements of Section 706(f) (Pet. App. 9a-10a).

Petitioner filed a motion under Rules 8(a)(1) and 12(b)(1), Fed. R. Civ. P., seeking dismissal of the complaint on the ground that the Commission, by failing to allege with particularity that it had satisfied each of the conditions precedent to filing suit, had not properly invoked the court's jurisdiction. The district court granted petitioner's motion to dismiss,

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[2]Section 706(f) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. (Supp. ~~III~~, 1973 ed.) 2000e-5(f), provides in part:

> (1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) and (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. * * *
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> (3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. * * *

[3]An employer must be engaged in an industry affecting commerce and have 25 or more employees (fifteen after March 1973) to be subject to the Act. 42 U.S.C. (Supp. III, 1973 ed.) 2000e(b).

with leave given the Commission to amend its complaint by specifically alleging all of the steps in the administrative process preceding a Commission decision to sue (Pet. App. 4a-13a). The Commission respectfully declined to comply with the district court's order, and the complaint was finally dismissed (*id.* at 14a).

The court of appeals reversed and remanded, holding that the general allegations of the original complaint had been sufficient, under its recent decision in *Equal Employment Opportunity Commission* v. *Standard Forge & Axle Co.*, 496 F. 2d 1392 (C.A. 5), certiorari denied, No. 74-310, January 13, 1975 (Pet. App. 1a-2a). Rehearing was denied (*id.* at 3a).

The petition presents the same question of proper pleading[4] that this Court declined to review in *Standard Forge*, and we rely upon our memorandum in opposition in that case.[5]

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[4]Much of the controversy below centered on whether Section 706(b) of Title VII (see Pet. 3-4) prescribes jurisdictional facts or conditions precedent to suit or whether, as the Commission urged, it merely delineates the procedural framework for the Commission's informal disposition of charges of unlawful employment practices. The court of appeals found it unnecessary to resolve this issue (Pet. App. 2a), and it is not before the Court at this time.

[5]We are sending petitioner's counsel a copy of our memorandum.

The question whether the court of appeals correctly applied its decision in *Standard Forge* to the particular circumstances of the pleadings in this case does not warrant further review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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